

By: Dev Gnanadev MD
Dev Gnanadev, M.D., Vice Chairman
Panel B

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition to Revoke Probation)	
Against:)	
)	
BERNARD ALAN SMYLE, M.D.)	Case No. D1-2006-172610
)	
)	OAH No. 2013020461
Physician's and Surgeon's)	
Certificate No. G 54848)	
)	
Respondent.)	
_____)	

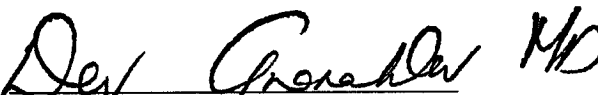
DECISION

The attached Proposed Decision is hereby adopted by the Medical Board of California, Department of Consumer Affairs, State of California, as its Decision in this matter.

This Decision shall become effective at 5:00 p.m. on November 15, 2013.

IT IS SO ORDERED October 17, 2013.

MEDICAL BOARD OF CALIFORNIA

By: 
Dev Gnanadev, M.D., Vice Chairman
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Petition to Revoke
Probation Against:

BERNARD ALAN SMYLE, M.D.,

Physician's and Surgeon's
Certificate Number G 54848,

Respondent.

Case No. D1-2006-172610

OAH No. 2013020461

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter in Los Angeles, California on September 10, 2013.

Christine R. Friar, Deputy Attorney General, represented Linda K. Whitney (Complainant.)

Bernard Alan Smyle, M.D. (Respondent), represented himself.

Evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FACTUAL FINDINGS

1. Complainant filed the Petition to Revoke Probation on October 14, 2012, in her official capacity as the Executive Director of the Medical Board of California (Board).
2. On May 28, 1985, the Board issued Physician's and Surgeon's Certificate number G 54868 to Respondent. The certificate has been renewed through February 28, 2015.
3. The Board disciplined Respondent's certificate, effective September 30, 2009, pursuant to a Stipulated Settlement and Disciplinary Order (Exhibit 3) in which Respondent admitted the allegations set forth in the Accusation filed in case number 05-2006-172610. In brief, Respondent admitted that he engaged in multiple acts of sexual abuse of the mothers of his pediatric patients. The abuse consisted of Respondent convincing these women to allow him to examine their feet to satisfy his sexual fetish, in violation of Business and Professions Code sections 726 and 2234.

4. Respondent's certificate was revoked, but the revocation was stayed, and the certificate was placed on probation for seven years upon terms and conditions that included, as pertinent to this matter:

7. Third Party Chaperone. During probation, respondent shall have a third party female chaperone present while consulting, examining or treating female patients or patients accompanied by a female during consultation, examination or treatment. Respondent shall, within 30 calendar days of the effective date of the Decision, submit to the Division or its designee for prior approval name(s) of persons who will act as the third party chaperone. Each third party chaperone shall initial and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read the Decision(s) and the Accusation(s), and fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient name, address and telephone number; 2) medical record number; and 3) date of service. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Division or its designee, and shall retain the log for the entire term of probation. Failure to maintain a log of all patients requiring a third party chaperone, or to make the log available for immediate inspection and copying on the premises, is a violation of probation.

17. Violation of Probation. Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

5. Once placed on probation, Respondent left pediatric practice. He is now employed by CannaMed, a medical marijuana evaluation center with offices in Santa Barbara, Ventura, and Thousand Oaks, California. Respondent has worked at all three offices. He began working for CannaMed in January 2011. He currently splits his time between the Santa Barbara and Ventura offices. He sees approximately 15 patients per day, the vast majority of whom are men.

6. Verdeena Richardson is an Inspector II with the Board and is Respondent's

probation monitor. On September 27, 2011, Investigator Richardson approved Monica Lindsay as Respondent's authorized chaperone. On April 19, 2012, Investigator Richardson appeared at Respondent's Ventura office for a routine probation visit. She asked to review the patient logs required by Condition 7 of Respondent's probation, and Ms. Lindsay presented them to her. The logs Ms. Lindsay gave to the investigator (Exhibit 6) were on the approved Board form, covered February 21, 2012, through April 17, 2012, and showed that Respondent had seen a total of 48 female patients during that period.

7. On 47 of the 48 entries in the log, Ms. Lindsay had included the patient's name, medical record number, and date of service, but did not record the patient's address or telephone number. Ms. Lindsay had initialed, as required, each log entry she had made. The investigator asked Ms. Lindsay to send her the completed logs and Ms. Lindsay said she would, but she never did. The investigator's report (Exhibit 8) indicated that she did not inform Respondent about the log deficiency during the April 19, 2012 visit.

8. Rachel LaSota is an Investigator III with the Board and is Ms. Richardson's supervisor. On May 7, 2012, Ms. Lindsay called the local Board office to complain about Respondent. Ms. LaSota returned the call and, after listening to Ms. Lindsay's complaints, instructed Ms. Richardson to make a return visit to Respondent's office. Ms. Lindsay had informed Ms. LaSota that sometimes Respondent would not have a chaperone in the examination room during the entire time he was with a female patient, but rather that he would leave the door of the examination room open.

9. On May 8, 2012, Investigator Richardson returned to Respondent's office. Ms. Lindsay was not there. Ms. Richardson told Respondent that she had come back to the office because Ms. Lindsay had never sent her the completed logs. Respondent advised the investigator that Ms. Lindsay no longer worked there, having left CannaMed's employ the day before, apparently the same day she called to complain about Respondent. Ms. Richardson told Respondent that he was "out of compliance" with his probation and she needed the completed logs immediately. Respondent complied by filling in all of the patient names and telephone numbers and faxing the completed logs to Ms. Richardson that same day (Exhibit 7). Ms. Richardson also admonished Respondent regarding the chaperone issue. She told him that the chaperone must remain present during the entirety of his exam/consultation of any female patient and that it was not sufficient for the chaperone to be in the room for part of the time, even if he left the door open when the chaperone left. Respondent stated that he would so comply. After this visit, Ms. Richardson sent Respondent a letter (Exhibit 12) regarding the chaperone and log issues and warned him, "If you are not compliant with the terms and condition (*sic*) of your order, further action may be taken against your license."

10. Board Investigator Elizabeth Costello interviewed Respondent at the Board's Valencia office on July 26, 2012. During that interview, Respondent admitted that he had been out of compliance with the terms of his probation both with respect to the logs and with not

having the chaperone present in the examination room at all times he was examining and or consulting with a female patient. Respondent admitted that while the chaperone would always be present at the beginning of the appointment, from time to time the chaperone would leave the examination room to tend to "front office" business or use the restroom. In those instances Respondent would leave the door to the examination room open. He believed that there was "a direct line of sight" from the front office to the examination room and that the available line of sight complied with the condition of having a chaperone present.¹

11. The Accusation alleges that, during his interview with Ms. Cstello, "Respondent stated that after the chaperone at the Santa Barbara location quit, a replacement chaperone was hired. The replacement worked as a chaperone for approximately two days prior to being interviewed and approved by the Inspector." (Accusation, page 6, lines 21-23.) The evidence established that during the period of time the chaperone was hired but not yet approved, Respondent saw no female patients. According to Inspector Richardson, the failure to obtain prior approval for hiring the chaperone was not a violation of probation so long as Respondent saw no female patients during the period the chaperone worked for him without Board approval.

12. Respondent was highly respectful of the Board and these proceedings. He acknowledged that, although Ms. Lindsay was in control of the logs, it was his responsibility to ensure the logs were properly maintained. At the time of Ms. Richardson's first visit, Respondent had completed nearly three years of probation with no log violations. He had checked Ms. Lindsay's record keeping for weeks after she was hired. Seeing no problem with her work, he did not bother to keep vigilant surveillance and stopped reviewing the logs. Respondent maintained that he would not be so lax again. After his meeting with Investigator Richardson on May 8, 2012, Respondent also changed his conduct regarding the presence of the chaperone. Now, if the chaperone has to leave the examination room at any time during an appointment with a female patient, Respondent also leaves the room and does not return until the chaperone returns.

13. Respondent was sincerely remorseful for his probation violations, violations that led to no patient harm and which he corrected as soon as they were pointed out to him. Other than as noted, Respondent has complied with the terms of his probation. He has completed the PACE program and the "professionalism" program. He has undergone more psychological and psychiatric counseling than the Board required. He is serious about controlling his sexual fetish and has had no relapse in that regard.

14. These proceedings have had an *in terrorem* effect on Respondent. He has now

¹ At hearing there was also proof that, at least for one examination of a female patient, Respondent had no chaperone present. That occurred On September 27, 2011 (Exhibit 16). The patient was Ms. Lindsay, Respondent's duly appointed chaperone.

completed four years of his seven-year probation and is highly unlikely to be in further violation. As noted by the Deputy Attorney General during the hearing of this matter, it is not necessary to vacate the stayed discipline and revoke Respondent's certificate in order to ensure the public protection for which probation is intended. Rather, as a lasting reminder to Respondent, and so that the Board will have ample opportunity to monitor his conduct, it would be appropriate to extend Respondent's probation for one year.

LEGAL CONCLUSION

1. The purpose of administrative license discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. While a licensing board is required to prove the allegations in an accusation by clear and convincing evidence, a licensing board is only required to prove the allegations in a petition to revoke probation by a preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1442.)

3. A "preponderance of the evidence" is usually defined in terms of "probability of truth," for example, as evidence that, "when weighed with that opposed to it, has more convincing force and the greater probability of truth." In deciding whether a party has met his or her burden of proof, courts consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the opposing party. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483.)

4. Complainant has established by a preponderance of the evidence that Respondent has violated the terms of his probation, by reason of Findings 4 through 11.

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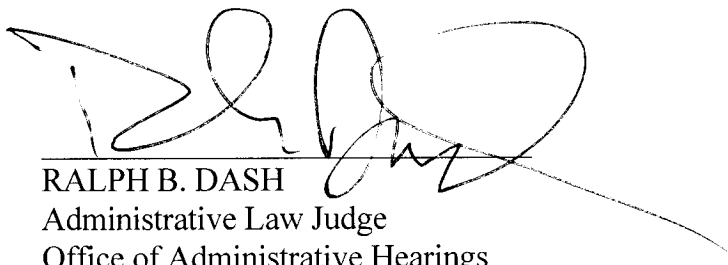
5. Although Respondent's certificate is subject to revocation, the extension of his probation for one year is sufficient to protect the public, by reason of Findings 12 through 14.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The probation of Physician's and Surgeon's Certificate number G 54868 issued to Bernard Alan Smyle, M.D., is extended for one year so that the total length of probation is eight years from September 30, 2009, the original effective date of the Decision in case number 05-2006-172610.

Date: 9-19-13



RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings